Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes

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It has been widely noted that individuals and associations alike are turning to the civil courts with increasing frequency for resolution of their disputes. Religious organizations have not been excluded from this trend. As a result, church counsel increasingly are being called upon to defend their clients in litigation which quite often raises issues at the heart of church organization and government. For example:

> A defrocked bishop and his followers sue their church claiming that the defrockment was arbitrary and wrongful under church law. They seek to have the bishop reinstated and also seek a declaration that the bishop, not his successor, is legally entitled to possession of diocesan property.[1]
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> A priest sues his bishop for denial of "ecclesiastical due process," alleging that the bishop defamed him and conspired with others to deny the priest a hearing before the archdiocesan tribunal, thereby interfering with his employment as a priest.[2]
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> A nun challenges her expulsion from her religious order, claiming that she was mentally ill at the time, and that church law precludes expulsion under those circumstances.[3]
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> A minister terminated by his church sues his bishop for invasion of privacy, claiming that he was terminated on the basis of information that the bishop obtained from the minister's psychiatrist, in violation of the patient-physician confidentiality privilege.[4]
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> A teacher at a religious school sues for wrongful dismissal and breach of employment contract after he is terminated for conducting afterschool sessions with his students at which he expressed views antithetical to the teachings of the church.[5]
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> One faction within a congregational church sues another for RICO violations, claiming that it is the "true" congregation and that the defendants have fraudulently usurped control of church property.[6]

These examples are based on the reported case law. In each, one of the first questions confronting church counsel is whether civil court jurisdiction is ousted, in whole or in part, by the religion clauses of the first amendment.[7] The answer to this

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1. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). *See infra* notes 21–32 and accompanying text.

2. Kaufmann v. Sheehan, 707 F.2d 355 (8th Cir. 1983). *See infra* text accompanying notes 43–48.

3. Kral v. Sisters of the Third Order Regular of St. Francis, 746 F.2d 450 (8th Cir. 1984). *See infra* text accompanying notes 53–55.

4. Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113 (1985). *See infra* text accompanying notes 101–06.

5. Menz v. Mazzolari, No. C–810712 (Hamilton County Ct. App. Aug. 11, 1982). *See infra* note 74.

6. Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983). *See infra* text accompanying notes 59–61.

7. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

question lies in what the United States Supreme Court has called a "religious thicket,"[8] a thicket which seems all the more impenetrable because the Court has suggested two seemingly contradictory approaches—deference and neutral principles—for resolving the issue. The purpose of this Article is first to outline these divergent approaches and then to set forth guidelines for determining when a civil court must defer in a religious dispute and when it can proceed in accordance with neutral principles of law.

I. THE "DEFERENCE" APPROACH—FROM *Watson* TO *Serbian Eastern Orthodox*

Church-related litigation falls generally into one of two categories: (1) property disputes—cases primarily involving which church faction is entitled to control of church property after a schism within the church or between the local and general church; and (2) ecclesiastical disputes—cases primarily involving questions of church discipline, organization, or government, such as expulsion of a member, appointment or defrockment of a minister, or structuring of the church polity.[9] The examples cited at the beginning of this Article are all of the second, ecclesiastical type. Most of the Supreme Court's decisions, however, have been in cases involving property disputes.[10]

A. *Origins of the Deference Rule*

The United States Supreme Court in *Watson v. Jones*[11] first devised the "deference" approach. *Watson* involved two factions of the Walnut Street Presbyterian Church in Louisville, Kentucky, competing for control of the church's property. During the Civil War the congregation had aligned into two groups—an antislavery faction, which was recognized and supported by the General Assembly of the Central Presbyterian Church of the United States, and a proslavery faction, which broke from the General Assembly and joined a new hierarchy, the Presbyterian Church of the Confederate States.[12] After the schism the General Assembly of the Central Church declared that under Church law, the antislavery group represented the true congregation of the Walnut Street Church and was therefore entitled to sole control of the church property. The proslavery faction nevertheless refused to relinquish control and the resulting litigation ultimately reached the Supreme Court in 1871.[13]

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8. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 719 (1976).

9. As pointed out later in this Article, this distinction between ecclesiastical and property disputes arises from the Supreme Court's decisions in this area and its differing modes of analysis. Also, it should be noted that both types of cases typically will arise in the context of *internal* church controversies. However, at least some of the issues may arise in litigation between a church and a third person who has no affiliation with the church, a matter which is discussed *infra* note 77.

10. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

11. 80 U.S. (13 Wall.) 679 (1871).

12. *Id.* at 690–92. The majority of the congregation supported the antislavery faction. *Id.* at 693.

13. *Id.* at 692–700. The first suit was brought in the Kentucky state courts, where the Kentucky Supreme Court

The Court ruled in favor of the antislavery faction, holding that the civil courts had no jurisdiction to review or overturn (and hence must defer to) the decision of the Church General Assembly, which had already decided that under Church law the antislavery group represented the true congregation. The Court stressed two interrelated reasons for this result: First, the civil courts have no authority to determine disputed issues of church doctrine or law, such as whether the Church General Assembly had exceeded its authority or had ruled in accordance with the Church constitution;[14] and second, the issue of which faction of the Walnut Street Church constituted the true congregation was one of "purely ecclesiastical" concern which had already been decided by the highest adjudicatory body of the General Church.[15] According to *Watson*:

> [T]he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[16]

Addressing the free exercise and establishment clause concerns, the Court found that federal common law

> knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence

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ultimately ruled in favor of the proslavery faction. Watson v. Avery, 65 Ky. (2 Bush) 332 (1867). The antislavery group then commenced a diversity action in federal circuit court, which refused to extend res judicata effect to the state court decisions and issued an injunction in favor of the antislavery faction. Watson v. Jones, 80 U.S. (13 Wall.) 679, 699–700 (1871). The proslavery group then appealed to the United States Supreme Court.

14. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1871). The Court noted two reasons for this principle. First, civil adjudication of doctrinal disputes would effectively place the state in the position of endorsing one religious viewpoint, to the prejudice of another, in contravention of the prohibition against official establishment of religion. *Id.* Second, the Court suggested that civil courts simply are not capable of resolving difficult questions of faith, at least not when the issues have already been passed upon by a church tribunal:

> Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies . . . has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

Id. at 729.

15. *Id.* at 733–34. This principle also rests on two grounds. First, and most importantly, is a concern with church autonomy on matters of purely religious significance. This, in turn, is in large part an outgrowth of the principle that civil courts must not decide disputed questions of religious doctrine or dogma. *Id.* at 728–29. Second, the Court reasoned that by joining the church, the members had effectively given their "implied consent" to be bound by the decisions of its tribunals. *Id.* at 729; *see infra* text accompanying note 17.

16. *Id.* at 727.

> of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[17]

Finally, the Court distinguished cases in which a personal liberty or a property right is endangered from a case involving purely ecclesiastical matters.

> But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.[18]

Watson, therefore, stands for the basic proposition that civil courts must defer to the decisions of church authorities on matters of purely religious concern (such as, in *Watson*, which faction of the local church constituted the "true" congregation).[19] The Supreme Court followed this formulation of the deference approach in church property disputes until its 1979 decision in *Jones v. Wolf*.[20] More important for present purposes, the Court also applied the deference approach in an ecclesiastical dispute, in its 1976 decision in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[21]

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17. *Id.* at 728–29. *Watson* was decided under federal "common law," rather than the Constitution or state law, since it predated both Cantwell v. Connecticut, 310 U.S. 296 (1940), and Everson v. Board of Educ., 330 U.S. 1 (1947), in which the Court held that the religion clauses are incorporated into the fourteenth amendment and thereby applicable to the states, and Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), in which the Court held that diversity actions in federal court must be decided according to the substantive law of the state in which the court sits. Nevertheless, the Court repeatedly has characterized *Watson* as having "a clear constitutional ring." Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446 (1969)).

18. *Id.* at 733–34 (emphasis in original).

19. *Id.* at 727. There is some question whether this proposition should be limited to hierarchical church litigation only, and whether disputes within congregational churches are subject to different considerations. *See infra* text accompanying notes 78–93.

20. 443 U.S. 595 (1979). The *Watson* deference approach was applied to church property disputes in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); and Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952).

21. 426 U.S. 696 (1976).

B. *Deference in Ecclesiastical Disputes*: Serbian Eastern Orthodox

Serbian Eastern Orthodox arose out of a decision by the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church to remove Dionisije Milivojevich as Bishop of the American-Canadian Diocese of the Church and to split that diocese into three smaller units. Bishop Dionisije and his followers refused to accept the defrockment and reorganization. They filed suit in Illinois state court seeking a declaratory judgment that the defrockment was invalid under the constitution and penal code of the Mother Church, and that Dionisije therefore remained the true Bishop of the American-Canadian Diocese. They also sought an injunction restraining the Mother Church from proceeding with the reorganization and a declaratory judgment vesting control of all Diocesan property in Bishop Dionisije.[22]

The trial court held that Dionisije had properly been removed as Bishop and that his successor had been validly appointed.[23] On the second issue, however, the trial court ruled that the reorganization was "improper and beyond the power of the Mother Church . . . ."[24] Both sides appealed. The Illinois Supreme Court affirmed as to the reorganization. It reversed on the issue of Dionisije's defrockment.[25] After conducting its own examination of the Church constitution and penal code, and based on its interpretation of those documents, the court concluded that the removal of Dionisije was contrary to Church law and therefore "arbitrary."[26] Its decision effectively reinstated Dionisije as Bishop of the Diocese.

The United States Supreme Court reversed on all issues. Writing for the Court, Justice Brennan, relying heavily on *Watson*, held that "The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of [the Mother Church], and impermissibly substitutes its own inquiry into church polity and resolutions based thereon . . . ."[27] Justice Brennan noted that Dionisije's defrockment and the reorganization of the American-Canadian Diocese were "questions of church discipline and the composition of the church hierarchy [which] are at the core of ecclesiastical concern."[28] He stressed that "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law," civil courts cannot make "inquiry into the procedures that canon or ecclesiastical law supposedly requires the church adjudicatory to follow, [nor] into the substantive criteria by which they are supposedly to decide the ecclesiastical question."[29]

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22. *Id.* at 706–07. The defendants then commenced a second action, which was consolidated with Dionisije's case, seeking a declaration that Dionisije had been properly removed as Bishop and that the reorganization was proper. *Id.* at 707.

23. *Id.* at 707.

24. *Id.*

25. Serbian E. Orthodox Diocese v. Milivojevich, 60 Ill. 2d 477, 509, 328 N.E.2d 268, 284 (1975).

26. *Id.* at 503, 328 N.E.2d at 281–82.

27. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708 (1976).

28. *Id.* at 717; *see also id.* at 710 (quoting Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (noting that such matters are "of purely ecclesiastical concern")).

29. *Id.* at 713.

Justice Brennan was particularly critical of the Illinois courts' independent examination and interpretation of the Church constitution and penal code,[30] pointing out that:

> Such a determination . . . frequently necessitates the interpretation of ambiguous law and usage. To permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide . . . religious law [governing church polity] . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.[31]

Given these considerations, Justice Brennan concluded with a strong reaffirmation of *Watson* and its deference principle:

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that *civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them*, in their application to the religious issues of doctrine or polity before them . . . .
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> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. *When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.*[32]

C. *Deference and Entanglement*

Like *Watson, Serbian Eastern Orthodox* is premised upon an underlying concern with "civil determination of religious doctrine,"[33] a role from which government is precluded by the religion clauses.[34] As one commentator has noted, "the most clearly

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30. *Id.* at 718–19. According to Justice Brennan:

> [T]he Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was "arbitrary" because a "detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of the Serbian Orthodox Church . . . ." *Not only was this "detailed review" impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the interpretations of relevant procedural provisions by the Mother Church's highest tribunals.* . . . The court also failed to take cognizance of the fact that the church judicatories were also guided by other sources of law, such as canon law, which are admittedly not always consistent, and it rejected the testimony of petitioners' five expert witnesses that church procedures were properly followed, denigrating the testimony of one witness as "contradictory" and discounting that of another on the ground that it was "premised upon an assumption which did not consider the penal code," even though there was some question whether that code even applied to discipline of Bishops. The court accepted, on the other hand, the testimony of respondents' sole expert witness that the Church's procedures had been contravened in various specifics.

Id. (emphasis added) (quoting Serbian E. Orthodox Diocese v. Milivojevich, 60 Ill. 2d 477, 503, 328 N.E.2d 268, 281 (1975)).

31. *Id.* at 708–09 (quoting Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

32. *Id.* at 709, 724–25 (emphasis added).

33. *Id.* at 709.

34. "[A] principal purpose underlying religious liberty is to remove the question of what is true religion from the domain of secular authority." P. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964). *See also* Weiss, *Privilege, Posture and Protection—"Religion" in the Law*, 73 YALE L.J. 593, 604 (1964) ("Any [civil] definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be. . . . Furthermore,

forbidden entanglement between church and state is the entanglement that occurs when institutions of civil government attempt to discover religious error by legal process, or to promulgate religious truth by legal decree."[35] If a civil court decides which of two or more competing interpretations of religious law is correct, it will necessarily (and impermissibly) be forced to define religious "truth" in order to render judgment in favor of one side and against the other. The same is true when a civil court is called upon to review and overturn the decision of a church tribunal on a matter of church discipline or organization, since there the court is replacing the tribunal's view of church law with its own. In either case, the court is impermissibly becoming "entangled" with religious interests.[36]

It was this concern with "entanglement" which led to Justice Brennan's criticism in *Serbian Eastern Orthodox* of the Illinois courts' independent examination and interpretation of the Serbian Orthodox constitution and penal code. Yet it is important to understand that *Serbian Eastern Orthodox* and its entanglement rationale do *not* foreclose *all* civil court inquiry into and interpretation of church doctrines. In *Serbian Eastern Orthodox*, the Court itself engaged in just such an inquiry into the constitution of the Serbian Orthodox Church in order to conclude that "final authority with respect to the promulgation and interpretation of *all* matters of church discipline and internal organization rests with the Holy Assembly [of Bishops]."[37] In other words, the Court reviewed church doctrine to determine the church's polity and thereby identify which church adjudicatory body, if any, was appointed by church

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an attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion.").

35. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–12, at 871 (1978). The Supreme Court has expressed a similar view on many occasions. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982) (quoting Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981)) (" 'Courts are not arbiters of scriptural interpretation' "); New York v. Cathedral Academy, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . . . "); Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) ("[S]tate inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); United States v. Ballard, 322 U.S. 78, 86–87 (1944).

36. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–12, at 865–80 (1978). Although the "entanglement" concept has been implicit in the Court's decisions for many years, as evidenced by *Watson*, it was not articulated until the Court's decision in Walz v. Tax Comm'r, 397 U.S. 664 (1970), in which the Court noted that "[w]e must also be sure that the end result [of any exercise of civil authority]—the effect—is not an excessive government entanglement with religion." *Id.* at 674. In *Walz* the Court identified two types of entanglements which are particularly suspect: "government evaluation" of religious matters, *id.* at 674; and involvement of "government in difficult classifications of what is or is not religious." *Id.* at 698 (Harlan, J., concurring).

Although the entanglement principle is normally associated with the establishment clause, it actually reflects values common to both of the religion clauses. The clauses are intended to foster two fundamental goals: "*voluntarism* (that belief should be free, not coerced) and *separatism* (that neither government nor religion should involve itself in the work of the other)." Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1058 (1978) (emphasis added). The free exercise clause is designed to preclude coercion of religious beliefs and thereby protect voluntarism. *Id. See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–3, at 818 (1978); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1386 (1967). The establishment clause serves the twofold purpose of preventing coercion in matters of belief and maintaining separation between church and state, thereby "combin[ing] the principles of voluntarism and separatism." Note, *supra*, at 1058. Entanglement between church and state implicates both values—it clearly defeats separatism and, in many if not all instances, has a coercive effect on matters of belief by promoting one belief to the inescapable prejudice of others.

37. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 716 (1976) (emphasis in original).

law to resolve the issues at hand.[38] According to *Serbian Eastern Orthodox*, this sort of civil inquiry can be undertaken without impermissible entanglement between church and state.[39] What a civil court cannot do is proceed to determine whether the appointed church authority properly followed and applied church law.[40]

The deference principle can generally be stated as follows: When confronted with an ecclesiastical dispute, a civil court first must determine the church's polity and thereby identify the church body which is authorized under church law to resolve the issues. If that body has adjudicated, the court must end its inquiry and defer further jurisdiction. In this sense, the deference approach is similar to the "exhaustion of internal remedies" requirement typical of many nonconstitutional areas of the law, with the difference being that once internal *church* remedies are exhausted, there is no further appeal to the civil courts. A corollary is, of course, that the civil courts must ensure that internal church remedies have been exhausted. If an aggrieved party resorts to the civil courts without first having exhausted his or her remedies before the applicable church bodies, the court should dismiss and leave that party to pursue internal relief.[41]

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38. *Cf.* First Baptist Church of Glen Este v. Ohio, 591 F. Supp. 676, 682 (S.D. Ohio 1983) ("[I]t is implicit in *Serbian* that civil courts may properly be called upon to *identify* the supreme judicial body in a hierarchical church which is appointed by church law to render a binding decision in church disciplinary matters.") (emphasis in original).

39. Justice White specifically made this point in his concurring opinion in *Serbian Eastern Orthodox*, 426 U.S. 696 (1976):

> Major predicates for the Court's opinion are that the Serbian Orthodox Church is a hierarchical church and the American-Canadian Diocese, involved here, is part of that Church. *These basic issues are for the courts' ultimate decision, and the fact that church authorities may render their opinions on them does not foreclose the courts from coming to their independent judgment.* I do not understand the Court's opinion to suggest otherwise and join the views expressed therein.

Id. at 725 (White, J., concurring) (emphasis added).

40. *See* Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980):

> *Serbian* neither foreclosed civil-court inquiry into the form of polity adopted by associated churches nor compelled judicial deference to the resolution of an altercation regarding church polity by a tribunal of a hierarchical church. Far from requiring civil courts to refrain from examining church documents for evidence of the polity adopted by members of a religious association, the Court's decision in *Serbian* itself was based on an examination of provisions in the respective church documents. . . . On the basis of this investigation, the Court concluded that ultimate authority . . . [was] with the hierarchical church organization. . . . *What the Court held impermissible was not the ascertainment of polity by means of a careful examination of church documents, but rather . . . "the state court's further inquiry into the faithfulness of the church hierarchy's decisions to the detailed provisions of church law."* Indeed, it was precisely because the polity previously adopted by the quarreling factions committed the matters in dispute to the exclusive province of the mother-church organization that the *Serbian* Court refused to permit the state court to substitute its interpretation of church law for that of the hierarchical tribunal in which authority to make the interpretation was found.

Id. at 1324 (emphasis added) (quoting Jones v. Wolf, 443 U.S. 595, 620 n.8 (1979) (Powell, J., dissenting)).

41. *See, e.g.*, Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974):

> Simpson was dismissed according to the procedures outlined in the Church's *Book of Discipline*. Appeals to the District Superintendent, to the Bishop, and finally to the Central Council of the denomination were available for him to correct any arbitrary or untoward action that may have been taken against him by the congregation. That appellate procedure within the church hierarchy was his avenue for review.

Id. at 494 (emphasis in original). Similarly, in First Baptist Church of Glen Este v. Ohio, 591 F. Supp. 676 (S.D. Ohio 1983), the court held that "[c]ivil courts must insure that an aggrieved church member has exhausted all internal 'rights of appeal' before any inquiry is made into internal church matters. Only after such appeal rights have been exhausted can a court determine that the highest church judicatory body has spoken on the matter." *Id.* at 683.

D. *"Ecclesiastical Disputes" Defined*

According to *Serbian Eastern Orthodox* and *Watson*, application of the deference principle is called for in ecclesiastical disputes. However, the Supreme Court has not clearly defined what constitutes an ecclesiastical dispute, other than noting that it involves "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."[42] Review of lower court decisions helps to fill this void.

1. *Church-Minister Relationships*

Perhaps the clearest instance of an ecclesiastical dispute is litigation, similar to the dispute in *Serbian Eastern Orthodox*, between a church and one of its ministers concerning his or her "employment." A number of lower courts have held that such matters are wholly beyond the bounds of civil jurisidction.

In *Kaufmann v. Sheehan*,[43] for example, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of a denial of ecclesiastical due process claim by a Catholic priest against his Bishop.[44] The priest had filed a grievance with the Archdiocesan administrative tribunal alleging that the Bishop had conspired and defamed him to prevent the priest from obtaining a position with another diocese.[45] He alleged that the Bishop and other church officials had violated Canon Law by depriving him of a due process hearing before a Church tribunal, thereby interfering with his "employment" as a priest.[46] Relying on *Serbian Eastern Orthodox*, the Eighth Circuit held that the case raised "inherently religious issues" which "should be left to church authorities for final determination."[47] The Eighth Circuit stressed that "employment" as a priest goes to the heart of church organization:

> In the instant case, however, Kaufmann's claims relate to his status and employment as a priest, and possibly to other matters of concern with the church and its hierarchy, and go to the heart of internal church discipline, faith, and church organization, all involved with ecclesiastical rule, custom and law. While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization. Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.[48]

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42. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).

43. 707 F.2d 355 (8th Cir. 1983).

44. *Id.* at 355–56.

45. *Id.* at 356.

46. *Id.* at 358.

47. *Id.* at 359.

48. *Id.* at 358–59. *See also* Hafner v. Lutheran Church—Missouri Synod, 616 F. Supp. 735 (N.D. Ind. 1985), in which a minister sued his church claiming that it was bound under the church constitution to provide for his welfare while he was ill, a duty which the church allegedly had failed to fulfill. The court noted that to resolve the dispute, it would be forced to adopt one of the conflicting interpretations of the church constitution advanced by the parties:

> In this case the plaintiffs are asking this court to interpret Article III, section 10 of the Constitution of the Lutheran Church-Missouri Synod. . . . There is some divergence of views between the plaintiffs and the defendants as to the duties that may be imposed upon the defendants under the aforesaid provisions of that church constitution. *If the plaintiffs are correct it will become the function of this court to interpret that*

The United States Court of Appeals for the Fifth Circuit expressed similar reasoning in *McClure v. Salvation Army*,[49] in which it held that Title VII of the Civil Rights Act of 1964 cannot be applied to the employment relationship between a church and its ministers.[50] In *McClure* the plaintiff, an ordained minister, alleged that she had received lower salary, fewer benefits, and less desirable assignments due to her sex, and also that she had been discharged from her ministry in retaliation for filing complaints with the Equal Employment Opportunity Commission.[51] The Fifth Circuit responded:

> [I]t would be useless to argue that these decisions [concerning assignment and compensation of ministers] are not matters of church administration and government and thus, purely of ecclesiastical cognizance.
>
> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. *Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government.*
>
> Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment . . . .
>
> We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister, would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.[52]

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provision of that church constitution. Such an inquiry is the kind of inquiry that was requested of and rejected by the Supreme Court of the United States in the Serbian Eastern Orthodox Diocese *case* . . . .

Id. at 737 (emphasis added). It concluded that it lacked "subject matter jurisdiction over this dispute between a minister and his church regarding the conditions of his employment . . . ." *Id.* at 739.

49. 460 F.2d 553 (5th Cir. 1972).

50. *Id.* at 560–61.

51. *Id.* at 555.

52. *Id.* at 560 (emphasis added). *See also* Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (holding that Title VII cannot be applied to the church-minister employment relationship); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (holding that Title VII could not apply to the employment relation between a seminary and its faculty, who were ordained ministers, but could apply to the relation between the seminary and its administrative and support staff).

The Fifth Circuit followed *McClure* in Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974), in which a pastor who had been terminated for his views on racial integration sought to sue his church for violation of his civil and constitutional rights. The Fifth Circuit affirmed dismissal of the pastor's complaint, reasoning that "[t]he interaction between the church and its pastor is an integral part of church government." *Id.* at 493. In reaching this conclusion, the court expressly rejected Simpson's contention that adjudication of his complaint was not precluded by the first amendment because his claim did not present an issue of doctrinal interpretation:

> Simpson contends, however, that his claim can be resolved without determining questions of religious doctrine. . . . Simpson would narrowly limit ecclesiastical disputes to differences in church doctrine. The cases negative such a strict view. A "spirit of freedom for religious organizations, an independence from secular control of minipulation [sic] in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" is reflected in the Supreme Court's decisions.

Id. at 493 (quoting Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

2. *Expulsion of Members of Religious Societies*

Closely related to disputes concerning the relationship between a church and its ministers is litigation over the expulsion of a member of a religious order. In *Kral v. Sisters of the Third Order Regular of St. Francis*,[53] for example, a Catholic nun challenged her expulsion from the Order on the ground that she was mentally ill at the time of the expulsion, and that canon law precluded expulsion under those circumstances.[54] The Eighth Circuit affirmed dismissal of her complaint, holding that:

> Plaintiff's case was considered by the highest church court of competent jurisdiction before her expulsion took place, and that court found that she was not mentally ill. Whatever the merits of that finding as a matter of fact, it is not within our province to review it. A claim of violation of the law of a hierarchical church, once rejected by the church's judicial authorities, is not subject to revision in the secular courts.[55]

3. *Disputes Between Competing Church Factions*

Whereas *Serbian Eastern Orthodox* involved a controversy between a church and one of its ministers, *Watson* highlights a dispute of an equally "ecclesiastical" nature—a fight between competing factions within a church. In *Nunn v. Black*,[56] dissident church members instituted a civil rights action claiming that they were unlawfully expelled from the congregation. The controversy centered on whether plaintiffs truly had been inspired by the Holy Spirit to speak in tongues, a claim which the congregation majority disputed.[57] Plaintiffs alleged that their expulsion violated church law. The court, however, held that it was

> compelled by the First Amendment to avoid adjudicating the issue of whether the plaintiffs' expulsion was in accordance with the procedure prescribed by the Church of God of Prophecy. . . . [T]he plaintiffs have voluntarily submitted to be bound by the decisions of a particular religious society and . . . have no recourse for review concerning the validity of their expulsion on the issue of their gift of tongues. . . . [I]t is certain that the ecclesiastical issue of the validity of the plaintiffs' speaking by inspiration of the Holy Spirit pervades the present controversy and removes it from this court's competence. . . . Finally, it is clear that the fact that the local church may have departed arbitrarily from its established expulsion procedures in removing the plaintiffs is of no constitutional consequence . . . .[58]

A federal district court reached a similar result in *Congregation Beth Yitzhok v. Briskman*,[59] in which one religious faction sought to prosecute civil RICO claims against another faction, contending that the defendants had fraudulently seized control of and embezzled funds from the congregation.[60] The dispute turned on whether plaintiffs' or defendants' leader was the true successor to the Skolyer Rebbe, the head

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53. 746 F.2d 450 (8th Cir. 1984).
54. *Id.* at 451.
55. *Id.*
56. 506 F. Supp. 444 (W.D. Va.), *aff'd mem.*, 661 F.2d 925 (4th Cir. 1981).
57. *Id.* at 445.
58. *Id.* at 448. *See also* First Baptist Church of Glen Este v. Ohio, 591 F. Supp. 676 (S.D. Ohio 1983) discussed *infra* text accompanying notes 87–93.
59. 566 F. Supp. 555 (E.D.N.Y. 1983).
60. *Id.* at 556.

of the congregation. The court declined to intervene on the ground that it would have to decide who was the true Skolyer Rebbe, a purely ecclesiastical question:

> In cases involving a dispute between two or more religious factions, the Court must look beyond the allegations of the complaint to ascertain what lies at "the heart of [the] controversy . . . ." Such an examination in this case leads ineluctably to the conclusion that resolution of the allegations in the complaint first demands that [the court] determine the proper succession to the post of Skolyer Rebbe. As tempting as that invitation may be, it does not appear to be the proper role of a federal court. . . . This court is not in a position to ascertain whether defendants' understanding of the Skolyer Rebbe's prerogatives reflects applicable religious law. It is therefore apparent that an issue of religious doctrine must be decided before it can be determined whether the defendants' acts were wrongful. The first RICO claim, for example, alleges misuse and conversion of Congregational funds. But if applicable religious law authorized defendants to expend those funds, the claim must fail. Resolution of the other allegations in the complaint would require similar, judicially proscribed, determinations of religious tenets.[61]

4. *Church Employment Disputes*

Watson and *Serbian Eastern Orthodox* seem to compel the conclusion that litigation between a church and one of its ministers or other clerics, or between competing church factions, is "ecclesiastical," if for no other reason than that such disputes are truly *internal* to the church and go to the heart of any religious organization.[62] The more difficult question is whether litigation between a church and one (or more) of its secular employees is "ecclesiastical" and thus requires judicial deference. Review of the decisions in this area seems to define the contours of an ecclesiastical dispute. A prime example is the United States Court of Appeals for the Sixth Circuit's recent decision in *Dayton Christian Schools v. Ohio Civil Rights Commission*.[63]

Dayton Christian Schools arose out of a fundamentalist Christian school's decision not to renew the contract of a pregnant teacher, Linda Hoskinson. The school based its decision on its view of "the importance of the mother in the home during the early years of child growth."[64] After being advised that her contract would not be renewed, Hoskinson retained counsel who wrote to the school threatening litigation. Hoskinson was then terminated for violating the school's Biblical "Chain-of-Command" policy, grounded in Scripture, which required all differences to be resolved internally "by utilizing Biblical principles."[65] The Ohio Civil Rights Commission, after Hoskinson filed a complaint, began formal proceedings against the school. The school then filed suit in federal district court seeking to enjoin the Commission from further prosecution. The district court denied injunctive relief and dismissed the school's complaint, holding that the Commission's exercise of

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61. *Id.* at 558 (quoting Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 122 (1952) (Frankfurter, J., concurring)).

62. *See supra* note 52 and accompanying text.

63. 766 F.2d 932 (6th Cir.), *reversed and remanded*, 106 S. Ct. 2718 (1986).

64. *Id.* at 934 n.2.

65. *Id.* at 934 n.3.

jurisdiction did not infringe upon the school's religious freedom.[66] The Sixth Circuit reversed, resting its decision on both the free exercise clause and the entanglement proscription of the establishment clause. On the entanglement issue, the court stressed three factors:

> [W]e conclude that allowing the OCRC to exercise jurisdiction over employment discrimination charges against DCS necessarily results in an excessive state/church entanglement due to the issues of good faith and motivation necessarily raised in such proceedings, the pervasively religious nature of the Christian school, the particularly sensitive role of the teacher in explicitly and implicitly fostering the religious beliefs and values that appellant-parents seek for their children, and the fact that religious considerations pervade the hiring scheme employed by DCS. Therefore, we conclude that application of the Ohio Civil Rights Act in this context impermissibly entangles the state in issues of faith in violation of the Establishment Clause of the First Amendment.[67]

In reaching this conclusion, *Dayton Christian Schools* relied heavily on the United States Court of Appeals for the Seventh Circuit's decision in *Catholic Bishop v. NLRB*,[68] which held that undue risks of church-state entanglement preclude jurisdiction by the National Labor Relations Board ("NLRB") over lay teachers at Roman Catholic schools. According to *Catholic Bishop*:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would

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66. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 578 F. Supp. 1004, 1041 (S.D. Ohio 1984). *See also* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 604 F. Supp. 101 (S.D. Ohio 1984) (in which the court enjoined the Ohio Civil Rights Commission from proceeding against the school in this situation pending the school's appeal of the district court's decision).

67. Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir.), *reversed and remanded*, 106 S. Ct. 2718 (1986). *See also* Walker v. First Presbyterian Church, 22 FEP Cases 762 (Cal. Super. 1980) (holding that local employment discrimination ordinance could not be applied to church which dismissed homosexual on ground that church views homosexuality as prohibited by the Bible). While this Article was at the printer, the Supreme Court of the United States reversed the Sixth Circuit's decision. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S. Ct. 2718 (1986), *reversing and remanding* 766 F.2d 932 (2d Cir. 1985). A five-member majority of the Court (per Justice Rehnquist) held that the District Court should have abstained from adjudicating this case under the *Younger* line of cases. 106 S. Ct. 2718, 2723. The Court said that in the wake of its admonition in *Younger* to abstain from enjoining pending state criminal proceedings, it had "since recognized that our concern for comity and federalism is equally applicable to certain other pending state proceedings . . . [including] state administrative proceedings in which important state interests are vindicated so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Id.* The Court went on to hold that the elimination of prohibited sex discrimination was a sufficiently important state interest to bring the case within the ambit of the *Younger* abstention principles, and that Dayton would have an adequate opportunity to raise its constitutional claims. *Id.* at 2723–24. Finally, the Court held that the Ohio Civil Rights Commission (OCRC) did not violate Dayton's first amendment rights by merely investigating the circumstances of the teacher's discharge. *Id.* at 2724.

In a seperate concurrence in the result, four Justices (per Justice Stevens) agreed that neither the investigation of certain charges by the OCRC, nor its conduct of a hearing on those charges was prohibited by the first amendment. 106 S. Ct. 2718, 2724. However, the concurring Justices disagreed with the majority's conclusion that the *Younger* abstention doctrine required the district court to dismiss the complaint. *Id.* at 2726 n.6.

68. 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979).

necessarily include the validity as a part of church doctrine of the reason given for the discharge.[69]

The United States Supreme Court affirmed *Catholic Bishop* on statutory grounds.[70] It noted, however, that extending NLRB jurisdiction over religious school teachers could raise constitutional entanglement dangers on two fronts. First, in many instances religious schools would defend unfair labor practice charges on the ground that the "challenged actions were mandated by their religious creeds."[71] According to the Court:

> The resolution of such charges . . . will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[72]

Second, the Court noted that the NLRB would be ruling upon the "terms and conditions" of the teacher's employment, and that "[i]nevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions."[73]

Catholic Bishop and *Dayton Christian Schools* illustrate that civil deference may be constitutionally mandated in litigation between a church and its secular employees. But this is not to suggest that all such employment disputes are ecclesiastical and hence an improper subject for civil oversight. A number of courts have held that civil jurisdiction does indeed exist, at least in certain instances. In *Universidad Central de Bayamon v. NLRB*,[74] for example, the United States Court of Appeals for the First

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69. *Id.* at 1125.

70. NLRB v. Catholic Bishop, 440 U.S. 490 (1979).

71. *Id.* at 502.

72. *Id.*

73. *Id.* at 502–03. *See also* Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979); McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978).

74. 778 F.2d 906 (1st Cir. 1985). *See also* Volunteers of America v. NLRB, 777 F.2d 1386 (9th Cir. 1985); Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985); Reardon v. Lemoyne, 122 N.H. 1042, 454 A.2d 428 (1982); Menz v. Mazzolari, No. C–810712 (Hamilton County Ct. App. Aug. 11, 1982). Both *Reardon* and *Menz* involved breach of employment contract claims by teachers dismissed from religious schools. In both cases the courts held that they could proceed with the litigation because no doctrinal issue necessarily was presented. *Menz*, for example, arose out of a decision by the pastor of St. Pius Roman Catholic Church to terminate Menz's employment as a teacher at the parish school. Menz's contract with the school included a provision that he would "act consistently in accordance with the stated philosophy and objectives of the School . . . and . . . respect the spiritual values and moral standards of the School." *Id.* at 3–4. He was terminated as a result of afterschool meetings with students, at which Menz expressed "beliefs not only against the philosophy and teachings of St. Pius, but basically heretical to tenets of the Roman Catholic Church." *Id.* at 2. His complaint for wrongful discharge, breach of employment contract, and defamation was dismissed by the trial court, on the ground that resolution of the case would entangle the court in Catholic doctrine. The Court of Appeals reversed. Although it acknowledged that "a court . . . must not overly interfere with the autonomy of clergy-administrators," *id.* at 6, and that "[i]t is clear . . . that [Menz] was fired because appellees believed he was teaching heretical beliefs at the meetings" with students, *id.* at 3, it nevertheless concluded:

> We find in the case *sub judice* that the trial court erred in dismissing appellant's breach of contract claim on the grounds that excessive entanglement would *necessarily* result from resolution of that issue. Appellant has argued that the school had no legal right to fire him for activities taking place in his own home and after school hours; i.e., that the contract does not control his activities when he is not at St. Pius school. Evidence should have been presented allowing a determination whether, under the employment contract or other grounds, the school could fire appellant for activities taking place in his own home and after school hours.

Id. at 6–7.

Circuit held that NLRB jurisdiction could be extended over the faculty at a Catholic university.

The distinction between *Catholic Bishop* and *Dayton Christian Schools*, on the one hand, and cases such as *de Bayamon*, on the other, highlights when a church employment dispute should be deemed a matter of purely ecclesiastical concern. In both *Catholic Bishop* and *Dayton Christian Schools*, the courts found a significant risk of civil intrusion upon doctrinal affairs, based upon the court's view that the primary mission of the school in question was to promulgate religious beliefs. When the school is pervasively sectarian, it is not unreasonable to assume, as the courts did in *Catholic Bishop* and *Dayton Christian Schools*, that doctrinal matters form an integral part of the relationship between the church school and its faculty. Under these circumstances, the entanglement danger presented by *Catholic Bishop* and *Dayton Christian Schools*, that civil authorities would be forced to adjudicate religious doctrine in order to resolve unfair labor or employment practice charges, is not only reasonably predictable but is in essence no different from the entanglement error committed by the Illinois courts in *Serbian Eastern Orthodox* when they conducted their inquiry into Serbian Orthodox doctrines to determine if Dionisije had been defrocked in accordance with Church law. Because both instances involve civil determination of religious doctrine, *Serbian Eastern Orthodox* and *Catholic Bishop* reveal that civil deference is appropriate. In the *de Bayamon* case, by contrast, the court found that the mission of the school in question was not to inculcate religious views but simply to provide a quality academic higher education.[75] Absent a pervasively sectarian mission, there was little danger of doctrinal matters becoming an issue in any employment dispute between the school and its teachers.

This distinction also provides some guidance as to which church-related matters constitute ecclesiastical disputes from which the civil courts must defer. Like *Catholic Bishop* and *Dayton Christian Schools*, each of the cases discussed thus far involved a *doctrinal issue*, requiring the court either to decide a question of religious truth (such as in *Nunn*, whether plaintiffs truly could speak in tongues, or as in *Briskman*, the identity of the true Skolyer Rebbe) or to review and overturn the ruling of an ecclesiastical tribunal or other church authority (as in *Kaufmann* and *Kral*).[76] *Serbian Eastern Orthodox* stresses that doctrinal interpretation in either form cannot be undertaken by the civil courts consistent with the first amendment. It is therefore the presence of a doctrinal issue that turns an internal church dispute concerning

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Similarly, in *Reardon*, four Catholic nuns brought suit against the school board of the Sacred Heart School, where they taught, and their Bishop and the Diocesan School Superintendent, alleging that the defendants had breached the plaintiff's' employment contracts with the school by declining to renew their contracts for another year. The sisters sought a declaration that the nonrenewal was wrongful and also that they had been denied due process procedures to which they were entitled under their contracts. Although the trial court dismissed, on the ground that resolving the dispute would entangle it in intrachurch affairs, the New Hampshire Supreme Court reversed, reasoning that "[i]n religious controversies involving property *or contractual* rights *outside the doctrinal realm*, a court may accept jurisdiction and render a decision without violating the first amendment." Reardon v. Lemoyne, 122 N.H. 1042, 1047, 454 A.2d 428, 431 (1982) (emphasis added).

75. Universidad Central de Bayamon v. NLRB, 778 F.2d 906, 909–11 (1st Cir. 1985).

76. As noted earlier, when a civil court reviews and overturns the decision of a church tribunal, it is effectively deciding religious doctrine since it is replacing the tribunal's view of church law with its own. *See* text accompanying notes 11–19.

discipline, organization, or government into an ecclesiastical dispute calling for civil deference.[77]

E. *Limits of the Deference Approach*

1. *Congregational Church Disputes*

Serbian Eastern Orthodox involved a hierarchical rather than a congregational church,[78] and there is much language in Justice Brennan's opinion which suggests that its rules of deference apply only to hierarchical churches. Yet it is apparent that what would unquestionably be an ecclesiastical dispute in a hierarchical church can

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77. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–09 (1976). "*Internal*" disputes are stressed because there is authority to suggest that the deference approach does not apply to litigation between a church and nonaffiliated third persons, even though doctrinal issues are present. In General Council on Fin. & Admin., United Methodist Church v. California Superior Court, 439 U.S. 1369 (1978), the General Council of the United Methodist Church was named as one of the defendants in a California state court securities fraud and breach of contract action arising out of the collapse of a California corporation that operated nursing homes. The plaintiffs in the state court action, present and former residents of the homes, alleged that the General Council was the "alter ego" of the collapsed corporation. *Id.* The General Council, an Illinois nonprofit corporation, moved to dismiss for lack of personal jurisdiction, arguing that under the Book of Discipline, containing the constitution and bylaws of the Methodist Church, it could not be the "alter ego" of the collapsed corporation and therefore could not be sued in the California courts. *Id.* at 1370. After an evidentiary hearing at which the Council presented testimony from church officials and experts concerning its role in the church hierarchy, the trial court rejected the Council's position and denied its motion. The California appellate courts declined to review the decision, and the Council then sought a stay of proceedings from Justice Rehnquist, as Circuit Justice, pending review by the full Court of the Council's petition for certiorari.

Before Justice Rehnquist, the Council argued that *Serbian Eastern Orthodox* precluded the state court from adopting its own interpretation of the church constitution. Justice Rehnquist disagreed:

> [A]pplicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intra*church disputes. . . . *But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes.* Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving *intrachurch disputes* the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. . . . *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant*, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Id. at 1372–73 (emphasis added). To support his position, Justice Rehnquist cited Cantwell v. Connecticut, 310 U.S. 296, 306 (1940), in which the Court pointed out, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." 439 U.S. 1369, 1373 (1978). It should be noted that Justice Rehnquist dissented in *Serbian Eastern Orthodox*, and it is questionable whether his views would be accepted by a majority of the Court. At least two lower courts, however, have followed Justice Rehnquist's lead in *United Methodist Council* and held that *Serbian Eastern Orthodox* does not apply to private litigation involving other than an intrachurch dispute. *See* Ambassador College v. Geotzke, 675 F.2d 662 (5th Cir. 1982); Pagano v. Hadley, 100 F.R.D. 758 (D. Del. 1984).

78. One author has described the difference between hierarchical and congregational churches as follows:

> At least three kinds of internal structure, or "polity," may be discerned: congregational, presbyterial, and episcopal. In the congregational form, each local congregation is self-governing. The presbyterial polities are representative, authority being exercised by laymen and ministers organized in an ascending succession of judicatories—presbytery over the session of the local church, synod over presbytery, and general assembly over all. In the episcopal form power reposes in clerical superiors, such as bishops. Roughly, presbyterial and episcopal polities may be considered hierarchical, as opposed to congregational polities, in which the autonomy of the local congregation is the central principle.

Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1143–44 (1962). In Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 369 n.1 (1970) (Brennan, J., concurring), Justice Brennan noted that a hierarchical church has central authority to which local churches are subject, whereas local churches in a congregational polity are not subject to higher authority.

just as easily arise in a congregational church. For example, suppose that a doctrinal dispute arises between two factions within a congregational church concerning which faction has adhered to the "true" tenets of the church. The majority faction schedules a meeting to vote on expulsion of the minority members. The dissidents immediately file suit, seeking to enjoin the meeting on the ground that notice of the expulsion vote was defective under the church bylaws. Can the court entertain the dissidents' complaint and enjoin the meeting? A number of courts apparently would, although it is difficult to square such a result with the entanglement principles underlying the deference approach.

Although *Watson v. Jones* involved a hierarchical church, the Court commented on internal disputes, including those arising in congregational churches, noting that they should be resolved by majority rule, in accordance with "the ordinary principles which govern voluntary associations."[79] The Court added that "[t]his ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority . . . might be found to be the only faithful supporters of the religious dogmas of the founders of the church."[80]

Watson is not particularly illuminating on the role of civil courts in disputes involving congregational churches. On the one hand, it suggests that courts are free to decide such cases on the basis of normal rules of contract and unincorporated associations. On the other hand, it clearly limits civil review by forbidding "inquiry into . . . religious opinions." This limitation would appear to preclude judicial review and interpretation of the bylaws and other organic documents of a congregational church.[81] However, in the term following *Watson*, the Supreme Court in *Bouldin v. Alexander*,[82] engaged in just such a review. In *Bouldin* the Court set aside a congregational church election for procedural irregularities, based not only upon the Court's independent examination and interpretation of organic church documents but also because the election did not comport with the Court's view of fundamental fairness and due process.[83] The Court held that trustees of a congregational church "cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules."[84]

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79. Watson v. Jones, 80 U.S. (13 Wall.) 679, 725 (1871).

80. *Id.*

81. *But see* Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1387 (1981):

> *Watson* clearly contemplated courts performing the contract function in such cases [involving congregational churches], and performing it by application of ordinary contract rules. It assumes, for example, that the court might examine church documents to decide whether a particular decision may be made by the officers of the church, or whether it requires a vote of the congregation.

82. 82 U.S. (15 Wall.) 131 (1872). Like *Watson*, *Bouldin* was decided under general federal common law. *See supra* note 17.

83. *Id.* at 138–40. In First Baptist Church of Glen Este v. Ohio, 591 F. Supp. 676, 682 (S.D. Ohio 1983), the court noted that "*Bouldin v. Alexander* . . . intimates that fundamental notions of 'due process' must govern the disciplinary acts of a congregational church."

84. Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 140 (1872). *Bouldin* did not cite *Watson*.

Bouldin has been the Supreme Court's only occasion to decide a case involving a congregational church. It, along with the dictum in *Watson*, has been read "for the proposition that courts need no special 'religion rules' when deciding cases involving congregational churches."[85] A number of courts have followed this view by adjudicating congregational church disputes.[86] Under this approach, the example given at the beginning of this section would properly be before the court. The court could proceed to interpret the church bylaws and, if appropriate, enjoin the congregation's majority from conducting the election.

The example cited at the beginning of this section, however, is based on *First Baptist Church of Glen Este v. Ohio*,[87] in which a federal district court was called upon to issue declaratory relief against a state court which had entertained the dissidents' complaint and enjoined the election called by the majority. The federal court declined to follow the traditional view of *Bouldin* and held, in effect, that special religious rules do indeed apply to disputes involving congregational churches.[88] It concluded that "[c]hurch discipline is an ecclesiastical matter *in a congregational church*,"[89] and that "civil court inquiry with respect to the underlying reasons for church disciplinary action is constitutionally impermissible."[90] In reaching this conclusion, the court reasoned that *Serbian Eastern Orthodox* provides the controlling standards, notwithstanding that a congregational rather than hierarchical church was involved:

> It is not altogether clear whether the Supreme Court, if confronted with an internal dispute within a congregational church, would follow the *Serbian* analysis in all respects. The early case of *Bouldin v. Alexander* . . . intimates that fundamental notions of "due process" must govern the disciplinary acts of a congregational church. . . . *However, because the "hands off" policy espoused by the* Serbian *Court is of constitutional dimension, we find it difficult to justify the application of a different standard where a congregational church is involved.*[91]

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85. Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1387 (1981).

86. *See, e.g.*, Abyssinia Missionary Baptist Church v. Nixon, 340 So. 2d 746 (Ala. 1977) (procedural irregularities in congregational church meeting); *In re* Galilee Baptist Church, 279 Ala. 393, 186 So. 2d 102 (1966) (involving court review of whether congregational church minister's termination was in accordance with church rules); Providence Baptist Church v. Superior Court, 40 Cal. 2d 55, 251 P.2d 10 (1952); Miller v. McClung, 4 Mich. App. 714, 145 N.W.2d 473 (1966); Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970); Zimbler v. Felber, 111 Misc. 2d 867, 445 N.Y.S.2d 366 (Sup. Ct. 1981) (renewal of rabbi's contract in congregational Jewish synagogue); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975); Mangum v. Swearingen, 565 S.W.2d 957 (Tex. Civ. App. 1978).

87. 591 F. Supp. 676 (S.D. Ohio 1983).

88. *Id.* at 682–83.

89. *Id.* at 683 (emphasis added).

90. *Id.*

91. *Id.* at 682 (emphasis added). *See also* Nunn v. Black, 506 F. Supp. 444, 448 (W.D. Va.), *aff'd mem.*, 661 F.2d 925 (4th Cir. 1981). The court in *Glen Este* essentially adopted a rule of deference parallel to that of *Serbian Eastern Orthodox*; whereas in hierarchical churches, civil courts must defer to the decisions of ecclesiastical tribunals, in congregational churches the civil courts must defer to the majority decision:

> [T]he affairs of a congregational church are governed by a majority of its members. . . . This principle applies to internal church disciplinary matters, including expulsion. . . . The government of church matters is entrusted to the membership . . . [and] the majority of members of a congregational church is entitled to amend its constitution and/or by-laws as it sees fit.

591 F. Supp. 676, 683 (S.D. Ohio 1983). *Glen Este* nevertheless left the door open for limited civil judicial review of congregational church law to ensure that the majority of its members has authority under the organic church documents to make the decisions in question. *Id.* at 682–83.

Glen Este is correct. It is difficult to discern any principled distinction between a court interpreting a congregational church's organic documents, as in our example, and the Illinois courts' impermissible review of the constitution and penal code of the Serbian Orthodox Church in *Serbian Eastern Orthodox*.[92] In each instance, a civil court is determining church law. Similarly, it is difficult to see any difference between a civil court deciding whether a minister was properly defrocked in a hierarchical church, and a court adjudicating that same issue when it arises in a congregational setting. In each case, the court is defining the criteria which the church, hierarchical or congregational, must employ in selecting its spiritual leaders, a doctrinal matter of purely ecclesiastical concern. Absent any principled distinction, the courts should defer jurisdiction whenever a question of doctrinal interpretation arises in a dispute concerning church discipline, organization, or government, regardless of whether the church is hierarchical or congregational. Any other result will lead inescapably to civil definition of religious law and doctrine, the very sort of entanglement that the first amendment forbids.[93]

2. *Fraud and Collusion*

The United States Supreme Court in *Gonzalez v. Roman Catholic Archbishop*[94] addressed a dispute over appointment to a Roman Catholic collative chaplaincy. Petitioner Gonzalez, the nearest male descendant of the chaplaincy's founder, claimed that he should be appointed. The Archbishop of Manila disagreed, on the ground that although Gonzalez qualified for the appointment under Canon Law as it existed at the time the chaplaincy was established, he failed to qualify under existing Canon Law. The Supreme Court reversed the trial court's judgment in favor of Gonzalez, holding that the civil courts must defer to the Archbishop's determination as to Gonzalez's qualifications, a matter of purely ecclesiastical concern.[95] In dictum, however, the Court suggested that deference to the Archbishop would not be appropriate if his decision was the result of "fraud, collusion or arbitrariness."[96]

Until the *Serbian Eastern Orthodox* decision, *Gonzalez* was viewed as establishing the possibility of "marginal civil court review" of what was otherwise an ecclesiastical matter, if fraud, collusion, or arbitrary action was present.[97] The

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92. *See supra* text accompanying notes 27–32.

93. *See* Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2020–22 (1983), pointing out that applying the deference principles to hierarchical churches but not congregational ones itself violates the establishment clause by preferring one religion over another. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) ("[n]either a state nor the Federal Government can . . . prefer one religion over another."). Justice Rehnquist made this same point in his dissent in *Serbian Eastern Orthodox*, 426 U.S. 696, 733 (1976) (Rehnquist, J., dissenting).

94. 280 U.S. 1 (1929).

95. *Id.* at 16–17.

96. *Id.* at 16. The "fraud, collusion and arbitrariness" exceptions of *Gonzalez* may be an outgrowth of the Court's concern in *Bouldin* that church disputes be resolved in accordance with principles of fairness and due process. *Cf.* Comment, Serbian Eastern Orthodox Diocese v. Milivojevich: *The Continuing Crusade for Separation of Church and State*, 18 WM. & MARY L. REV. 655, 660 (1977); Comment, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113, 1119–20 (1965).

97. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1969). *See also* Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 369 n.3 (1970) (Brennan, J., concurring); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 and n.23 (1952).

"arbitrariness" exception of *Gonzalez* was the basis for the Illinois Supreme Court's review of the Church constitution and penal code in *Serbian Eastern Orthodox*, and for its conclusion that the Mother Church had wrongfully defrocked Bishop Dionisije by "arbitrarily" departing from the Illinois court's view of Church law.[98] Justice Brennan's opinion in *Serbian Eastern Orthodox* explicitly rejected such a reading of *Gonzalez* noting that

> no arbitrariness exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law.[99]

It is doubtful that any "arbitrariness" exception exists after *Serbian Eastern Orthodox*. However, that case left open the question "whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion.'"[100] Apparently these exceptions to the deference approach continue to exist. The Massachusetts case of *Alberts v. Devine*[101] is a prime example of an exception to the deference approach if the court finds collusion between the parties.

Alberts arose out of a decision by the Southern New England Conference of the United Methodist Church not to reappoint Pastor Alberts as the minister of Boston's Old West Church. The decision was based, at least in part, upon information obtained from Alberts' psychiatrist by his Bishop and the Conference District Superintendent.[102] The Bishop allegedly reported to the Conference that Alberts was mentally ill and therefore unsuitable for the ministry.

Alberts sued the Bishop and District Superintendent for invasion of privacy, on the ground that they had wrongfully induced his psychiatrist to disclose confidential information.[103] The defendants answered that Alberts' claims were precluded by a "constitutional prohibition of inquiry by the civil courts into matters of church doctrine and administration."[104] They reasoned that their inquiries to the psychiatrist were undertaken pursuant to the Church's Book of Discipline, which required them "to obtain information about Alberts's mental and emotional well-being."[105] The Massachusetts Supreme Judicial Court was unpersuaded. It assumed that the defendants' reading of the Book of Discipline was correct, thereby purporting to avoid any question of doctrinal interpretation, but held that the Book of Discipline could not shield the defendants from liability:

98. *See supra* text accompanying note 26.

99. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).

100. *Id.* at 713.

101. 395 Mass. 59, 479 N.E.2d 113 (1985).

102. 479 N.E.2d 113, 116 (1985). The Bishop apparently had persuaded the psychiatrist to voluntarily disclose the contents of Alberts' files.

103. 479 N.E.2d 113, 116 (1985). Although Alberts labeled his claim as one for invasion of privacy, he sought damages for loss of earnings, the remedy typical in a wrongful termination of employment claim.

104. 479 N.E.2d 113, 117 (1985).

105. 479 N.E.2d 113, 122 (1985).

> It is clear that the assessment of an individual's qualifications to be a minister, and the appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other State interference. . . . A controversy concerning whether a church rule grants religious superiors the civil right to induce a psychiatrist to violate the duty of silence that he owes to a patient, who happens to be a minister, is not a dispute about religious faith or doctrine nor about church discipline or internal organization . . . .
>
> We conclude, therefore, that even if it be assumed, without inquiry, that the Book of Discipline or other rule of the United Methodist Church provides that [the Bishop and the District Superintendent] had a right, or even a duty, to seek medical information about Alberts from [the psychiatrist], the First Amendment does not preclude the imposition of liability on those defendants. We also conclude that the First Amendment does not bar judicial inquiry into the church's proceedings culminating in Alberts's failure to gain reappointment.[106]

The only distinction between Alberts' complaint concerning his failure to be reappointed and the complaint of Bishop Dionisije in *Serbian Eastern Orthodox* concerning his defrockment is that in *Alberts* the Bishop and District Superintendent "colluded" with Alberts' psychiatrist in connection with their decision. This distinction should not be enough to bring *Alberts* within the *Gonzalez* exceptions for "fraud" and "collusion." Although *Serbian Eastern Orthodox* purported not to address the "fraud" and "collusion" exceptions, Justice Brennan did note that they apply only "when church tribunals [or other church authorities] act in bad faith *for secular purposes*.[107] There was no suggestion in *Alberts* that the Bishop and District Superintendent had anything other than an ecclesiastical purpose—to ensure the qualifications of one of the church's ministers.

Limiting the *Gonzalez* exceptions to wrongful acts having a secular purpose or effect is fully consistent with *Serbian Eastern Orthodox* and the constitutional values it serves. If church authorities commit a fraud or other wrongful act upon church members, in furtherance of church purposes, then the matter remains an internal one, committed to church tribunals for final and binding resolution. If, however, the wrongful acts are undertaken to further a nonecclesiastical goal, or if the victim is beyond the scope of church authority, then the focus of any subsequent civil litigation would be upon the wrongful act itself, not church doctrine or decisions concerning internal governance, such that a civil court would run little risk of entangling itself in religious issues by adjudicating the case. For example, *Serbian Eastern Orthodox* and its deference principle would offer no shelter to a minister accused of sexually abusing one of his parishioners, since his actions serve no church purpose. Similarly, if the Bishop in *Alberts* had gained access to the psychiatrist's files by burglarizing the psychiatrist's offices, thereby implicating the legal interests of not only Alberts but also a third person—the state—*Serbian Eastern Orthodox* should not shield the Bishop from prosecution by the state.[108]

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106. 479 N.E.2d 113, 122–23 (1985).

107. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) (emphasis added).

108. *Cf. In re* Rabbinical Seminary Netzach Israel Ramailis, 450 F. Supp. 1078 (E.D.N.Y. 1978) (allowing a grand jury to subpoena financial records of a rabbinical seminary for investigation of possible criminal violations regarding a federal education funding program).

II. Neutral Principles of Law

A. Jones v. Wolf—*New Rules for Church Property Disputes*

In *Serbian Eastern Orthodox* Justice Brennan was careful to point out that "this case essentially involves not a church property dispute, but a religious dispute."[109] The distinction appears to be significant in light of the Court's changing rules for deciding church property disputes.

As noted earlier, *Watson v. Jones* was the first case to apply the deference principle in a church property dispute. The principle was applied thereafter by the Court in both property and ecclesiastical disputes.[110] Beginning with its 1969 decision in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[111] however, the Court began to suggest that deference may not always be appropriate in church property disputes. Although *Hull Church* applied the deference principle to church property litigation, it noted that such cases might be capable of resolution by the civil courts through application of "neutral principles of law."[112] The following term, Justice Brennan in his concurrence in the *Church of God* case[113] also noted his approval of the "neutral principles" approach.[114]

The Supreme Court explicitly applied "neutral principles" in *Jones v. Wolf*,[115] decided in 1979, three years after *Serbian Eastern Orthodox*. *Jones* arose from a schism within the Vineville Presbyterian Church. A majority of the congregation, including the minister, voted to separate from the general hierarchy, the Augusta-Macon Presbytery of the Presbyterian Church in the United States, and to affiliate with a new hierarchy. In response to the schism, the Presbytery appointed a commission to investigate the dispute, and it ultimately concluded that the minority faction constituted "the true congregation of the Vineville Presbyterian Church."[116] The minority faction then brought suit in the Georgia courts, seeking a declaration that it was entitled to possession and control of the Vineville Church property.[117]

Purporting to apply neutral principles of law, the trial court examined the deeds to the property, which vested title simply in the Vineville Church itself, and the general church Book of Order, which did not establish any trust in favor of the general church. Based on these facts, the trial court concluded that the property belonged to the local congregation, and that the local congregation was represented by the withdrawing majority faction, notwithstanding the Presbytery's decision to the contrary. The Georgia Supreme Court affirmed.[118]

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109. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976).
110. *See supra* text accompanying notes 19–21.
111. 393 U.S. 440 (1969).
112. *Id.* at 449.
113. Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367 (1970).
114. *Id.* at 370 (Brennan, J., concurring).
115. 443 U.S. 595 (1979).
116. *Id.* at 598.
117. *Id.* at 598–99.
118. Jones v. Wolf, 241 Ga. 208, 243 S.E.2d 860 (1978).

It is readily apparent that the Georgia courts' decision could not possibly be squared with the deference principle. The ruling of the Presbytery in *Jones* that the minority faction constituted the true congregation of the Vineville Church was no different from the decision of the General Assembly in *Watson* that the antislavery faction represented the true congregation of the Walnut Street Church. Yet, although the Supreme Court reversed in *Jones*, it did not do so based on the deference rule. Instead, the Court reversed because it believed the Georgia courts had failed to articulate the grounds for their conclusion that the majority faction was the "true" congregation.[119]

The Court directed the Georgia courts to decide this issue in accordance with "neutral principles of law"—"objective, well-established concepts of trust and property law familiar to lawyers and judges."[120] The Court suggested a number of alternatives. First, the Georgia courts could adopt a rebuttable presumption of majority representation, "defeasible upon a showing that the identity of the local church is to be determined by some other means."[121] On the other hand, the Georgia courts could decide the question of who represented the true Vineville congregation by "deference to the presbyterian commission's determination of that church's identity."[122] According to *Jones*, the Georgia courts were free to decide the case or defer to church authority, so long as the decision involved neutral principles and not "consideration of doctrinal matters."[123] The Georgia courts were not required, however, to honor or defer to the Presbytery's decision: "We cannot agree . . . that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."[124]

The neutral principles approach of *Jones* in effect requires a two-step analysis of church property disputes. First, the court must examine the deeds to the property and any other relevant documents, including the church constitution or bylaws, to determine where title to the property is vested and whether it is held in trust. This step is not novel and is fully consistent with neutral principles, since it is merely an application of standard property and trust principles.[125] The second step is novel. If the court finds that the property is owned by the local congregation and is not held in trust for the general church, it must then apply neutral principles to decide who constitutes the local congregation. Prior to *Jones*, this was the point at which the deference principle came into play, and the identity of the local congregation was

119. Jones v. Wolf, 443 U.S. 595, 606–11 (1979).

120. *Id.* at 603.

121. *Id.* at 607.

122. *Id.* at 609.

123. *Id.* at 602 (quoting Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).

124. *Id.* at 605.

125. In *Watson* the Court noted that an application of neutral principles, limited to simple judicial interpretation of the express terms of a deed, will, or other instrument of ownership, would be appropriate. 80 U.S. 679, 722–23 (1871). To this extent, *Watson* is consistent with the first step of the *Jones* neutral principles approach. Neither *Watson* nor any other case, however, intimates any basis for the second step *Jones* requires. Even in *Hull Church* and *Church of God*, in which the Court noted "neutral principles" with approval, there was no suggestion that it would supplant the deference principle.

decided solely by church authorities and then honored by the courts.[126] After *Jones*, the courts need not defer to church authorities on this issue, but can proceed to adjudicate it according to neutral principles, whatever they may be.

B. *Neutral Principles in Ecclesiastical Disputes*

Whatever the merits or demerits of neutral principles may be as applied to church property disputes,[127] the more significant question for present purposes is whether the neutral principles approach applies to ecclesiastical disputes as well. As noted earlier, Justice Brennan in *Serbian Eastern Orthodox* was careful to distinguish Bishop Dionisije's case from church property litigation,[128] thereby suggesting that ecclesiastical disputes are to be treated differently from property disputes.[129] On the other hand, Justice Brennan also noted that "[t]he constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity."[130] In support of this comment, Justice Brennan cited to his concurring opinion in the *Church of God* case, in which he had noted neutral principles with approval as a means for resolving church property disputes,[131] thereby suggesting that the neutral principles approach may be available in ecclesiastical disputes.

Despite these intimations to the contrary, it is difficult to believe that the Court will extend *Jones*' neutral principles approach to ecclesiastical disputes such as *Serbian Eastern Orthodox*.[132] As noted earlier, *Serbian Eastern Orthodox* and the other deference cases rest upon a concern with civil court adjudication of doctrinal issues,[133] and indeed it is the presence of such a doctrinal issue which turns a case concerning church discipline, organization, or government into an ecclesiastical one calling for deference.[134] Once a doctrinal question is present in a case, it cannot be avoided through neutral principles or any other approach. In such a case, deference is the only approach consistent with the first amendment. As one commentator has explained:

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126. *See supra* text accompanying note 41.

127. *Jones v. Wolf* and its "neutral principles" approach have engendered a good deal of commentary. *See, e.g.*, Adams & Hanlon, Jones v. Wolf: *Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980); Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378 (1981); Note, *Church Property Dispute Resolution: An Expanded Role for Courts After* Jones v. Wolf?, 68 GEO. L.J. 1141 (1980); Note, Jones v. Wolf: *Neutral Principles Standard of Review for Intra-Church Disputes*, 13 LOY. L.A.L. REV. 109 (1979).

128. *See supra* text accompanying note 109.

129. This assumes that at the time of *Serbian Eastern Orthodox*, Justice Brennan recognized the pending shift from "deference" to "neutral principles" in church property disputes.

130. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 723 (1976).

131. Maryland & Virginia Eldership of the Churches of God v. Church of God, 396 U.S. 367, 370 (1970) (Brennan, J., concurring).

132. In *Jones* itself, the Court suggested that neutral principles will be limited to church property disputes. The Court seemed to reason that different treatment of property disputes, allowing for greater civil intrusion upon religious affairs, is necessary to further "[t]he State['s] . . . obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." Jones v. Wolf, 443 U.S. 595, 602 (1979).

133. *See supra* text accompanying notes 33–40.

134. *See supra* text accompanying notes 75–77.

> Where intrachurch disputes demand decisions about doctrinal truth or invite judicial interference with the freedom of churches to organize themselves and appoint their own officials and leaders, neutral principles jurisprudence dictates judicial abstention. Because only "neutral"—that is, common law—principles can be applied, doctrinal and ecclesiological standards are implicitly excluded from the courtroom. Neutral principles of civil law do not include standards for judging appropriate qualities for church leadership, the appropriate content of church teachings, or the truth of religious beliefs. When confronted with a doctrinal or internal church decision, courts following a neutral principles approach must dismiss the suit.[135]

C. *Deference Versus Neutral Principles—Reconciling the Two Approaches*

We are necessarily left with two different approaches for resolving similar issues—deference for ecclesiastical disputes, and neutral principles for church property disputes. Therefore, the first step in any intrachurch litigation must be to determine whether it primarily involves questions of church discipline, organization, or government, or whether it primarily concerns control of church property. If the case is of the latter type, then a *Jones v. Wolf* neutral principles analysis is appropriate.

If the case is of the former type, then a more searching analysis is required. It must also be determined whether a doctrinal question—either a dispute as to the meaning of religious doctrine (in its broad sense) or review of the decision of an ecclesiastical tribunal or other proper church authority—necessarily will be confronted in adjudication of the case. If such a doctrinal question is present, the court must then determine the nature of the church's polity and identify the church authority appointed by church law to resolve the matter internally. If that authority has acted, and there is no claim of fraud or collusion for a secular purpose, then the court must defer. If the aggrieved party has not presented his claim to the proper church authority, the court should also defer and force the plaintiff to exhaust his internal remedies. Only if there is no doctrinal issue, or if one of the other steps set forth above is not present, should the court proceed with the case, taking care to avoid intruding upon doctrinal matters.

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135. Note, *Judicial Resolution of Intrachurch Disputes*, 83 COLUM. L. REV. 2007, 2027 (1983).